FILE COPY.

Office Supreme Court U. S.
FILED
MAR 16 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
THE SPANISH SMACK "PAQUETE HABANA," Justa Galban et al., claimants. } No. 578.

THE UNITED STATES, APPELLANT,
v.
THE SPANISH SCHOONER "LOLA," SEVERO Gonzalez, claimant. } No. 579.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
THE SPANISH SMACK "PAQUETE HABANA," Justa Galban et al., claimants. } No. 578.

THE UNITED STATES, APPELLANT,
v.
THE SPANISH SCHOONER "LOLA," SEVERO Gonzalez, claimant. } No. 579.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These cases have returned to the court (175 U. S., 677) upon appeal by the United States from decrees below under the proceedings had in obedience to the order of this court that the proceeds of the sale of vessel and cargo should be restored with damages and costs, the damages to be compensatory only and not punitive. At the outset, then, although the capture was technically unlawful and without probable cause,

the idea of vindictive damages as for a gross marine trespass is eliminated.

It will be recalled (pp. 678–679 of said opinion) "that the *Paquete Habana* was a sloop 43 feet long on the keel and of 25 tons burden, and had a crew of three Cubans, including the master," and that she had a cargo of about 40 quintals of live fish when she was captured; that "the *Lola* was a schooner 51 feet long on the keel and of 35 tons burden, and had a crew of six Cubans, including the master," and that she carried a cargo of about 10,000 pounds of live fish when captured; that the *Paquete* was sold after the decree of condemnation below for $490 and the *Lola* for $800, there being no other evidence in the original record (on condemnation) of the value of either vessel or of her cargo.

Under the remand by this court the cause was referred to a commissioner to ascertain and report the amount of compensatory damages to be recovered by claimant, and testimony was taken on behalf of the claimants and the United States. The following is an abstract of the evidence as to the *Paquete* (Rec., pp. 27–35, 49–50):

Jose Pazos, commanding the smack *Antonio Castelerio* at the time of the capture of the *Paquete*, states that he, with his two brothers, owned a half interest in the *Paquete;* had known her for eighteen or twenty years; the vessel was valued at the time of her capture at $4,500 Spanish gold; her cost price (one-half interest) was $2,400; she earned about $75 per month;

was always engaged in the fishing business; the owners received one-third, with a certain allowance, and the seamen two-thirds of the earnings; no books were kept with reference to the business of the vessel (pp 27–28).

Juan Lluria y Pujadas, shipwright and harbor master at Havana, states that he inspected and valued the *Paquete Habana* to be worth on March 1, 1898, $4,500, basing his estimate upon the special conditions of the vessel and his constant inspection and appraisement of numbers of such vessels (p. 29).

Francisco Gandon and Antonio Suarez, engaged in the fishing business at Havana, state that during the months of April and May, 1898, fresh fish were sold in Havana at $10 (Spanish silver—worth 50 cents on the dollar) per quintal; before the blockade fresh fish brought $7 per quintal (pp. 30–31).

On behalf of the Government, John F. Horr, United States marshal, states that the *Paquete Habana* was a small sloop smack; she was sold for $490; considering her age and size, $1,500 would be a fair valuation; the value given refers to value at Key West.

Alfred Atchison, deputy marshal during the early part of 1898, states that he had the fishing smacks in his custody, and made an examination of their condition; they were in generally good condition; the vessels were all sold back to the people in Havana.

The testimony in the case of the *Lola* is to the same effect (pp. 22–26, 31–32, 39), and proceeds upon the same basis as to the amount of loss on the part of

claimants, and as to reduction of the claim on the part of the United States.

The commissioner's report in general, and his particular findings as to the *Paquete*, placed the damages at $5,687.06, made up of the following items (p. 58):

Value of vessel		$4,500.00
Interest on same at 8 per cent from date of capture, April 25, 1898, to November 2, 1901		1,287.00
		5,787.00
Less proceeds returned claimant		121.69
		5,665.31
And expenses of issuing and executing commission		21.75
Total		5,687.06

The cargo of fish was omitted, probably from inadvertence.

The commissioner accepted the testimony taken in Havana as establishing the value of the vessels and of the fish to the claimants at the dates of capture. (Rec., p. 57.)

In the case of the *Lola*, upon the same course of reasoning, the commissioner reported the damages at $6,643.91 (p. 50).

The district court overruled exceptions to the commissioner's report and findings, and confirmed his award, adding costs and interest (*Paquete*, p. 65; *Lola*, p. 55), and, the question of law as to whether the naval captors or the United States were responsible having been duly raised and argued, decided by final decree that the claimants recover of the United States; that is, the judgment runs against the Government

Whereupon the United States appealed, and under the assignments of error (*Paquete Habana*, p. 66; *Lola*, p. 60) brings the two questions of the *quantum* of damages and responsibility therefor before this court.

ANALYSIS OF EVIDENCE IN DETAIL AND COMMENTS THEREON.

The *Paquete* was seized April 25, 1898, by the U. S. S. *Castine*, Commander Robert Berry, U. S. Navy, commanding. (Rec., p. 1.) She was of 25 tons burden, and carried a cargo of 40 quintals of fish at the time of capture, according to the testimony in preparatorio of Pazos, the master (pp. 9, 10). He also states that none of the officers or crew had any interest in the vessel, but that the interest of the crew in the cargo was two-thirds, and of the owner one-third. The boat had been called the *Restless* at one time (id.). She is of sloop rig and has one mast. (Master's test affidavit, p. 13.) On the other hand, his brother testifies (pp. 27, 28) that the master, another brother, and himself owned a half interest in the vessel, the other half being owned by Dona Galban; that the *Paquete* was American built, and according to his recollection was of 36 tons burden, net; that the average take of fish on her trips was 30 quintals, but he does not remember the exact amount on any particular trip, nor the amounts realized from the sale of the cargoes. The testimony of this witness is that the value of the vessel at the time of capture was $4,500 Spanish gold, based upon the cost price of the half interest which he and his brothers had bought ($2,400) with the addition of certain repairs; that vessels of this class ordinarily earned 18 to 20 per cent

net, and this particular vessel about $75 profit per month, his basis of information being accounts kept by commission merchants who handled the catch. This witness had known the vessel for eighteen or twenty years, and purchased his interest in her about 1892. The said commission merchants paid for the fish at the rate of $10, Spanish silver, per quintal, which was divided among the owners and crew according to their respective interests. No books or accounts were kept by the parties in interest as to the vessel's business (pp. 27–28).

The harbor master at Havana (p. 29) confirmed this appraisement of value of the vessel, and referred to his certificate of inspection and appraisement. This is a special document given for the purposes of this case in November, 1898, at the instance of parties in the claimant's interest, and does not refer to antecedent records kept by the harbor master; he kept no records. The certificate values the *Paquete* at $4,500 Spanish gold, and describes her as of 28 tons burden. This is a third variation as to tonnage in claimant's testimony, and, taken in connection with all the circumstances, suggests not unfairly that the certificate may experiment with the harbor master's recollection, and perhaps contain some guesswork (pp. 29–30).

The testimony as to the cargo shows that before the blockade fresh fish were worth $7 Spanish silver per quintal, and rose to $10 during the blockade. The figures given were the highest market rates, "as the prices of all kinds of provisions gradually rose at that period" (pp. 30–31).

The testimony for the United States shows that Horr, the marshal (pp. 32 et seq.), having lived about thirty years at Key West had built and partly owned six small sailing vessels; that while he had no special knowledge of the value of fishing smacks, he states that there is no material difference between them and ordinary small vessels of like character, except the well for the fish, which would add a little to the cost of construction. He knows of a contract which was let at $90 per ton for building a wooden vessel of this same general type (p. 34). In response to the question (p. 35) whether the claimant's valuation for the *Paquete* was not excessive, and if so, what would be a fair valuation, he testified as follows:

> The *Paquete* was a small sloop smack. I do not recollect about her age; I knew about her age at that time, but don't recall now. She sold for $490. Considering her age and size, I would think $1,500 would be a fair valuation for her.

It is evident that some of these vessels and other such vessels were built or formerly owned in Key West, and were then sold in the Havana market (p. 37; see also testimony of Milton Curry, p. 45, and of Lowe, p. 47). Many or all of the smacks were ultimately sold in Havana or to parties residing there, and presumably to claimants (Horr, p. 37; see also Lowe, p. 47; Atchison, pp. 49, 50). Cates (p. 40) says as to the *España* that he offered to sell her to the owners for $3,500, and they would not give that much money, and that (p. 42) he ultimately sold her to her former

owner for $2,500. The expression in Atchison's testimony (p. 50) is that these vessels "were sold back to *the people* in Havana."

It is evident from Horr's testimony (p. 37), while he is cautious about the difference between values at Key West and Havana, that as a matter of fact these fishing smacks originally came from Key West, and that Cuban purchasers customarily came over to Key West to buy such vessels at the rates prevailing in the latter port. The difference in the construction between ordinary boats and fishing smacks of such tonnage does not seem to him to involve a great difference in the cost, and he is evidently speaking from knowledge and experience (p. 38). The certain decrease in the value of fishing smacks plying from Key West for the Cuban trade, because of the change a short time previous in the Spanish tariff on fish, or other port restrictions in Cuba on importations, manifestly should not be permitted to have undue weight upon the question of value. In general, the Havana market for such boats was relatively better and the Key West market relatively worse than formerly. This point can add nothing material to the simple fact that when these boats were sold, conditions at Key West were not specially favorable. The resales, however, to the former owners and claimants here, or to other parties in Havana, are a far more significant test of the real value at Havana, and invariably fall far below the figures allowed by the commissioner and the court. It is evident, too, from Horr's testimony and from other evidence, that most of these boats were old. The suggestion that the

smacks, built or formerly owned in the United States, had been repaired and overhauled in Cuba, and that Horr's opinion was expressed without exact knowledge of the boats' history in this respect, can not weaken the general purport of his testimony given from acquaintance with these particular vessels and from his rather wide knowledge and experience. Indeed, the drift of the cross-examination on this point (*Paquete* record, pp. 38–39) is difficult to follow. The marshal was testifying as to the value of the boats at the time of seizure and sale. He shows that the vessels were old American built and owned boats, sold in Havana and renamed He had seen and examined them at the time of the Government sale. What had been done to them in the way of rebuilding or repairing, either before the sale or after they had been resold to their former owners or other parties in Havana, has no bearing whatever on the question of value here—the crucial question of value at the time of capture.

It may be noted (*Paquete*, p. 39) that there was no sale or return of the cargoes of fish, there being no market for them at Key West, so they were distributed among the crews of the smacks, or of revenue cutters, or died and were thrown away.

The witness Cates (p. 40) is familiar with the selling of vessels in the Key West market and their values, having traded in them for years. He shows that the auction sale brought together many people, and that there was considerable bidding and competition. Cash also (p. 43) qualifies as a witness on the subject because of his business experience at Key

West; so also Curry (pp. 44, 45) and Lowe (p. 46). Atchison's occupation as a seaman (p. 48) has made him familiar with the value of sailing vessels. These men have traded in vessels of this same general type for years. W. B. Curry (p. 52), although he does not consider himself an authority on the value of sailing vessels, has lived for 30 years at Key West, has owned a portion of five vessels, and has bought and sold such vessels.

The *Lola* was seized April 27, 1898, by the U. S. S. *Dolphin*, commanded by H. W. Lyon, commander, U. S. Navy. (Rec., p. 1.) The testimony in *preparatorio* (p. 9) shows that she is of about 55 tons burden, and that the usual arrangement obtained as to the interest of her master and crew in the catch, being in the proportion of one-third and two-thirds. The master had owned the vessel for fifteen years; does not know where she was built; she formerly went under a different name; she carried 10,000 pounds of fish. In his test affidavit the master says that the vessel's actual length is about 51 feet, and her tonnage about 35 tons. She is of schooner rig and has two masts (p. 13). The owner (p. 22) bases his valuation of $5,000 on the fact that he had made considerable repairs and improvements after he had purchased the boat in 1887, and his claim is that her earnings were 20 to 22 per cent per annum. It does not appear whether this was gross or net. He gives the items of deduction from the cargo's distributive value, as between owner and crew, in the nature of an allowance to the vessel for

expenses. He does not remember how much he paid for the vessel, but believes he obtained it at a cheap price. He made expensive repairs, resulting in an appraisement at $5,000. As in the *Paquete* case, no books were kept of the business of the vessel, but supposedly the particulars will be found in the books and accounts of the factors or commission merchants. There was a settlement after each trip (pp. 22–23). The certificate of the harbor master (p. 24) gives the tonnage at 35 tons and the appraisement at $5,000 Spanish gold.

Horr testifies as follows as to the sale of the *Lola* (Rec., p. 31):

> Q. You sold the *Lola*, did you?
>
> A. Yes, sir.
>
> Q. How much did she bring?
>
> A. Eight hundred dollars.
>
> Q. She is valued by the present claimants at $5,000. State whether or not you consider that a fair valuation.
>
> A. No, sir; I consider it excessive in the United States—in Florida and Key West—because I know that such a vessel could be built for considerably less money.

I observe that there is some confusion as to the *Lola* and *Engracia*, the phrase "*Lola Engracia*" being used by some witnesses to describe either vessel. But inasmuch as the *Lola* sold for $800 and the *Engracia* for $1,000, the identity can be traced and confusion avoided. Thus, Milton Curry, referring to the *Lola* (p. 39), says that she and the *Severita* were owned in

Key West a number of years before, and that the estimate of value upon which he purchased was based on information received from the crews of the smacks and from parties in his employ who were familiar with the vessels. He considered the prices he paid fair for his speculative purposes. He resold the *Lola* for $1,800, after putting repairs on her of value $50 to $100.

This is a proper place to say, for application to all of these vessels, that while it can not fairly be insisted that the prices at which they were sold at the Government sale can be taken as conclusive on value, the prices at which they were resold, as the record shows, to parties in Havana in some cases, and very likely in all cases to the claimants themselves, are a reasonable and normal test of the capital values of the various vessels.

It is evident that here we have claims inflated to an unreasonable degree, and an acceptance of the highest figures claimed, by the commissioner and the court, without careful scrutiny and almost as matter of course. The estimates or appraisements by or on behalf of owners, whose interest is the most patent thing in the record, is taken unchallenged and as established; and the halt called by the Government testimony is brushed aside as guesswork or as proceeding from unqualified witnesses. It is natural to suppose that claimants invoking under the decision of this court on condemnation the merit of poverty and hardship (not altogether deserved as the firm or corporate character

of ownership or its capitalistic implications are traced) find their neighbors, business connections, and national officials quick to aid them and to turn vague recollections not based on records into formal certificates. It is well to remember what Dr. Lushington said in *The Soglasie* (Spinks Prize cases, 104), cited in *The Benito Estenger*, 176 U. S., 568, 580:

> With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extrordinary facility. What the court especially desires is that testimony which bears less the appearance of formality—evidence natural to the transaction, but which often carries with it a proof of its own genuineness. The court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which, when it bears upon the face of it the aspect of sincerity, will always receive its due weight.

See also *The Vigilantia*, 1 C. Rob., 1, 7.

It is insisted, on the other hand, that the Government witnesses who were without interest and had been familiar for years with the conditions of the active Key West market for vessels of this type, being only 85 miles from Havana (*Lola*, Rec., p. 30), are entitled to belief in their substantial consensus of opinion that the

claims were inflated, and are to be regarded as giving the sober evidence of shrewd and qualified men. It is always to be remembered that in general these boats were resold in Havana at figures in advance of the purchase prices at the Government sale, but far below the amounts claimed. There is good reason apparent in the record for believing that in some if not all instances the former owners, the claimants themselves, bought the vessels at these figures much below their claims. There is another point showing that the Key West testimony is informed and significant, and this is found in the fact that many of these boats were Key West built and were known to the witnesses. It is also to be noted that as a rule they were old, although in fair condition for old boats; but they were not only second-hand vessels, but second-hand vessels which had been known in those waters under different names for fifteen or twenty years or more. The American buyers at the Government sale had expended various sums in moderate repairs, in painting, cleaning, etc., which amounts when they clearly appear are certainly to be deducted from the estimates of value theretofore.

Further, when the proximity of Key West to Havana is considered, and the direct and derived interest of the claimants' witnesses, together with the general upward impulse of values at Havana during blockade, extending not only to food supplies, but to all instruments of their collection, are kept in view, it seems to me preposterous to grant in this wholesale way the

prime cost of brand-new vessels (or more) to these instruments or agencies of enemy commerce and supply, which were thus enhanced in value by our own siege; and this point is accentuated when we regard the cargoes, as to which the admitted highest value due to our blockade operations is allowed. If we take the price of fresh fish at Havana before the blockade (*Lola*, p. 25; *Paquete*, p. 31)—and under a fair presumption *just* before the blockade, that is, *imminente bello*—at $7 Spanish silver per quintal, and make the fair allowance of $1 for the degree of advance due to the war then reached, we shall find that $6 Spanish, or $3 American, is a fair allowance for the fish, as against the full rate of $10 Spanish, or $5 American, allowed by the commissioner and the court.

The rate of interest on such allowances has surely fallen in the last half century, and is not to be computed as of forty or fifty years ago, nor at the Florida legal rate of this day; and it is a reasonable and fair assumption that the normal rate in an established Spanish city of the consequence of Havana, a well-known money market in touch with all the great financial centers, would not exceed 6 per cent.

Applying these ideas and adjustments to the cases in hand, we find for the *Paquete* as follows:

In place of the commissioner's statement at page 58 of the record, as readjusted and increased by the court's final decree (p. 65), we submit the following statement

as a fair and reasonable basis for the reformation of the decree herein:

THE "PAQUETE HABANA."

[Of sloop rig, one mast, 28 tons burden, at least 20 years old, sold at the Government sale for $490. (Rec., pp. 13, 28, 30, 35.)]

Capital value		$2,000.00
(Horr testifies, page 35, *Paquete* Rec., that $1,500 would be a fair valuation; the addition of $500—33⅓ per cent—brings her up to a liberal figure in view of all the circumstances shown.)		
Cargo, 40 quintals of fish, at $3		120.00
		2,120.00
Interest at 6 per cent from date of capture, April 25, 1898, to November 2, 1901, date of commissioner's report, 3 years 6 months 8 days		448.02
		2,568.02
Less proceeds returned to claimant (Rec. 23)	$121.69	
Interest at 6 per cent from date of return, April 16, 1900, to November 2, 1901, 1 year 6 months 28 days	11.52	
		133.21
		2,434.81
Add expenses of issuing and executing commission to Havana		21.75
Add as per court's decree (p. 65), costs	$25.00	
Interest at 6 per cent from November 2, 1901, to June 16, 1902, on $2,434.81	87.78	
		112.78
Total as of June 16, 1902, being the date of the court's final decree, with interest thereon at 6 per cent until paid		2,569.34

And as to the *Lola* the figures are:

THE LOLA.

[Of schooner rig, two masts, 35 tons burden, 15 years old or more; (Rec., pp. 9, 13, 24.)]

Capital value, price on resale	$1,800.00	
Less repairs, say (p. 40)	75.00	
		$1,725.00
Cargo, 100 quintals of fish, at $3		300.00
		$2,025.00
Interest at 6 per cent from April 27, 1898, to November 2, 1901, 3 years 6 months 6 days		366.53
		2,391.53
Less proceeds returned to claimants (p. 17)	$425.16	
Interest from April 16, 1900, to November 2, 1901, 1 year 6 months 17 days	39.47	
		464.63
		1,926.90
Add expenses issuing and executing commission in Havana		21.75
		1,948.65
Add costs	$25.00	
And interest on $1,948.65 from November 2, 1901, to June 16, 1902, 7 months 14 days	72.75	
		97.75
		2,046.40

With interest at 6 per cent from June 16, 1902.

We submit that the foregoing figures for the *Paquete* and *Lola*, respectively, offer a just and fair basis for reforming the decrees below.

ARGUMENT.

I.

AS TO THE MEASURE AND QUANTUM OF DAMAGES.

(*a*) *Considering the analogy of the general maritime rule.*

The principles governing damages for ordinary marine torts, when the punitive feature does not appear, follow the general rules of allowance of damages for injuries to property. The underlying idea is that the person injured shall be made whole—that he shall be put in the same position that he was in before, receiving interest also to bring his avails up to the date of judgment or payment. The doctrine as regards collision is stated by this court in *The Baltimore* (6 Wall., 377, 385), as follows:

> The damages which the owner of the injured vessel is entitled to recover are estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expense incurred in making repairs, and unavoidable detention. *Restitutio in integrum* is the leading maxim in such cases, and where repairs are practicable the general rule followed by the Admiralty courts in such cases is that the damages assessed against the respondent shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred.

(See also *Williamson* v. *Barrett*, 13 How., 101; *Sturgis* v. *Clough*, 1 Wall., 269; *The Potomac*, 105 U. S., 630.)

In cases of total loss by collision "damages are limited to the value of the vessel, with interest thereon, and the net freight pending at the time of the collision." (*The Umbria*, 166 U. S., 404, 421.)

The text-books state the rule thus:

> In measuring the damages in a case of collision, all the direct and immediate consequences are to be taken into consideration, as loss of freight, detention, expense, and the like, the rule being *restitutio in integrum*. (1 Parsons on Shipping and Admiralty, pp. 539–540; see also 2 Sedgwick on Damages, secs. 592 *et seq.*; 1 Sutherland on Damages, p. 24.)

The rule as to damages in the cases of seizure is thus stated by Mr. Justice Story in the case of *The Apollon* (9 Wheat., 362):

> This court on various occasions has expressed its decided opinion that the probable profits of a voyage either upon the ship or cargo can not furnish any just basis for the computation of damages in cases of marine tort. * * * Where the vessel and cargo have been sold, the *gross amount of the sales*, together with interest, has been adopted as a fair recompense, and *the addition of 10 per cent* has been sometimes made where the property was sold under disadvantageous circumstances or had not arrived at the country of its destination. Such, it is believed, has been the rule most generally adopted in practice in cases which do not call for aggravated or vindictive damages.

Demurrage also is allowed where a vessel is held without probable cause. (*The Three Friends*, 166 U. S., 1; *The Conqueror*, id., 110, and cas. cit.)

The method applied in these cases far oversteps the rule of the *Apollon*; and the Government is willing to concede that the resales in the Havana market offer a fair measure of loss.

(*b*) *Considering the rule in prize.*

The rule in prize as to damages for seizures without probable cause is practically the same as that laid down in the case of the *Apollon*. In *The Lively* (1 Gall., 315), the court states the principle and refers to the general practice in that regard as follows:

> The damages, then, ought to be equal to the real injury sustained; and unless there have been personal indignities * * * the damages ought to go no farther. * * * In cases where the vessel and cargo have been captured, and afterwards lost to the owner, the Supreme Court of the United States have confined themselves to the prime value thereof and interest thereon to the judgment. * * * Nor does the rule of foreign courts on restitution seem materially to vary. Where the property has been sold, and no account of sales has been rendered, the value is estimated at the prime cost and 10 per cent profit; where an account of sales is rendered, that in general is made the measure of the decree. * * * The first object is to repair the actual damage and loss, and the next to punish aggravated misconduct. * * * An allowance of damages upon the basis of a calculation

> of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community. * * * Much would depend upon the length of the voyage, and the season of arrival. * * * After all, it would be a calculation upon conjecture and not upon facts. * * * Upon the whole I am well satisfied that the profits, upon the supposition of a prosperous termination of the voyage, ought not in any case to constitute an item of damage.

It seems to me that "prime cost" here should relate not to the original cost of new vessels but to the prices and values of these very vessels, as shown by their repurchase in the Havana market; and that if the probable profits of a particular voyage may not be considered in computing damage allowance, the test of average earnings through a series of years is also properly to be excluded.

The rules expressed in the *Lively* were the basis upon which damages were allowed in the cases of the *Charming Betsy*, 2 Cr., 64; *Maley* v. *Shattuck*, 3 Cr., 458; *The Lucy*, 3 C. Rob., 208; *The Narcissus*, 4 C. Rob., 20.

Cases like those cited and like the present ones are to be carefully distinguished from those where there was a gross marine trespass which involved outrages and the principle of punishment properly applicable thereto, not possible to be invoked in the present cases under the order of this court. (*The Amiable Nancy*, 3 Wheat., 546; *Del Col* v. *Arnold*, 3 Dall., 333; *The Anna Maria*, 2 Wheat., 327; *The San Juan Baptista*, 5 Rob., 33.

It is difficult to believe that vessels which sold for such moderate sums, even allowing for the unfavorable condition of sale, were worth at the time of capture the values which the commissioner and court below placed upon them. After all, they were second-hand boats, and the fair market value of the *res* must be taken into account as determined by its character and condition and the prices actually realized. This element must be kept in mind as well as the earning capacity and the profits yielded to owners. If one went to a fishing port to bargain for a schooner of the fishing fleet there, I imagine a sale would not be effected on the basis of earnings in an exceptional year or even in a normal year. I know no good reason why a court, sitting to measure damages for loss or injury, should not give weight to the obvious element, and in ordinary transactions the controlling element, of market value. Old and second-hand boats are numerous in the markets and notoriously of low, uncertain, and diminishing value. The views of owners and parties in interest are pretty uniformly inflated, and a certain steady and natural doubt exists as to their statements of original cost, present value, and earning capacity. I can perceive no good reason why the court market should be so much more favorable than any other.

Moreover, it is to be observed that we are dealing after all with enemy property, benefited by an exemption not the less of grace because it is now recognized as a settled usage of international law; but still we are dealing with enemy property. Not only so, but

these vessels, however innocently, were seeking to reach Havana and to take into that beleaguered port men who might be valuable in resistance or defense, and much needed food supplies. Our own blockade operations and the imminency of war for weeks before had greatly enhanced the value of food supplies, including fresh fish, and doubtless for that reason enhanced the real or supposed value for the time being of boats and other instruments which brought fish and different provisions. The court will remember the evidence of concentration of food supplies at Havana which was presented in the *Carlos Roses* case (177 U. S., 655). However much this idea may be repelled by the statements in evidence that the tests of value here relate to normal conditions and usual times, it is almost inevitable that claimants should import into the case some reflection of the war status which temporarily gave their property an abnormal value.

I do not mean to intimate any lack of honesty or *bona fides* in their statements and claims. But why should the United States, whose belligerent operations caused this condition, pay its enemy for a result which was manifestly one of the intended compulsions of war, viz, the reduction of the enemy partly through the deprivations and rigors of a siege? It seems to me contrary to just public policy for this country to bear *pro tanto* the burden which its own war arm was seeking to place upon the enemy. I submit that this court should itself resettle the allowance of damages on a reduced basis, or else send the case back to the lower court for this purpose.

II.

ON RESPONSIBILITY AS BETWEEN THE GOVERNMENT AND THE NAVAL CAPTORS.

(*a*) *The general aspect of the case.*

The Government is very well aware that the rules of prize law impose in this matter a great burden upon individual officers who were simply performing their duty as they saw it, and who had no desire or intent to break a rule of law.

The imposition of costs and damages upon the captors will tax officers whose conduct was actuated by a high sense of duty, and who, especially because of the insignificant money value of the vessels taken, were not influenced by sordid motives. This burden, regarding the innocent intent of these officers and the absence of malicious motive, may be looked upon in a general way as unmerited. Yet such an imposition of costs and damages is in accordance with a well-recognized rule of prize law, followed in this country and in England by the greatest jurists of both nations. And the Government, however individuals may regret the necessity for placing this financial loss upon brave and honorable officers, must contend before this court for the rule of law as it exists.

The official correspondence relative to these captures consisted of a telegram sent by Admiral Sampson after the seizure to the Secretary of the Navy, in effect recommending capture of such vessels and detention of their crews as prisoners of war since they belonged to the Spanish naval reserve; and of the Secretary's

reply that "Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained." The view of the court upon this interchange was that—

> The admiral's dispatch assumed that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling; and the necessary implication and evident intent of the response of the Navy Department were that Spanish coast fishing vessels and their crews should not be interfered with so long as they neither attempted to violate the blockade nor were considered likely to aid the enemy. (175 U. S., 713.)

From this it is a fair inference that in the view of the court, however innocent and free from intent to commit a trespass the naval captors were, their course finds no justification in correspondence or instruction from the Navy Department, which presents the clear intimation that their mistaken construction of the rule of international law and their action in making the seizures are to be charged to themselves and render them personally liable.

(*b*) *Principles as to Government liability for torts.*

The fundamental principle is that the Government is not liable for torts or for tortious or unauthorized acts of its agents, and, in general, can not be sued except as it may have expressly rendered itself liable to suit. (*Robertson* v. *Sichel*, 127 U. S., 507; *Gibbons* v. *United States*, 8 Wall., 269; *Whiteside* v. *United States*, 93

U. S., 247; *Hart* v. *United States*, 95 U. S., 316; *Moffat* v. *United States*, 112 U. S., 24.) The United States is not liable for costs, and a judgment against it for costs will be reversed. (*United States* v. *Barker*, 2 Wheat., 395; *The Antelope*, 12 Wheat., 546; *United States* v. *McLemore*, 4 How., 286; *United States* v. *Boyd*, 5 How., 29; *Reeside* v. *Walker*, 11 How., 272; and see *Stanley* v. *Schwalby*, 162 U. S., 255.) A money judgment can be rendered against the United States by the Court of Claims only. (*Case* v. *Terrell*, 11 Wall., 199; *The Siren*, 7 Wall., 152; *The Davis*, 10, id., 15.)

(*c*) *The prize rule on this subject.*

Story says, in Principles and Practice of Prize Courts, page 42, "The general rule in respect to public ships is that the actual wrongdoer, and he alone, is responsible," citing English authorities and *The Eleanor* (2 Wheat., 346).

In *The Eleanor* the claim was that a loss of the prize through a tempest was due to a doubtful strategem on the part of the captors resulting in the refusal of the crew found on the prize to do their duty. The decree below found damages due to the claimants against the commander of the squadron.

The opinion intimates that if the facts of the case had made out a marine trespass, the captain of the capturing vessel, who had died after the filing of the libel, would have been liable.

In *Maley* v. *Shattuck* (3 Cr., 458) it appears that Maley was a lieutenant of the Navy commanding a

public armed vessel of the United States, who stopped and searched a neutral vessel and, upon the suspicion that she was enemy property or an American vessel engaged in a violation of the nonintercourse act, put a prize crew on board, and soon after the vessel was captured as prize by a British vessel of war, carried to Jamaica and libeled, and condemned there as French or Spanish property. The judgment of the court was that Lieutenant Maley had a right to stop and search the vessel and to exercise his judgment on the propriety of detaining her, but that he appears to have come to a decision not warranted by the testimony presented to him. The court was of opinion that Shattuck's claim against Maley for the costs of an ineffectual attempt to reverse the sentence of the court in Jamaica ought not to be allowed, since through the claimant's own fault it was not prosecuted in time, but affirmed the sentence of the circuit court awarding compensation for the vessel and her cargo against Maley, with certain collateral claims and expenses.

It is to be noted that the Attorney-General appeared for Maley.

The case of *Little* v. *Barreme* (2 Cr., 170) was an action brought by the neutral owner or master against the captor, and restitution was ordered below, but not damages, because in the court's opinion there was probable cause. On appeal to the circuit court this sentence was reversed and damages allowed. Marshall, C. J., held that it was not a case in which probable cause existed to produce suspicion; that instructions of

the President to the commander of a public armed vessel of the United States to do an illegal act do not justify the officer in doing it, nor so far excuse him as to exempt him from the payment of damages.

> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers, and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where in consequence of orders from the legitimate authority a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is that the instructions can not change the nature of the transaction or legalize an act which without those instructions would have been a plain tres-

> pass. * * * Captain Little, then, must be answerable in damages to the owner of this neutral vessel.

In *The Mentor* (1 Rob., 129), an American ship was destroyed by part of Admiral Digby's squadron after the cessation of hostilities, and it was held that the actual wrongdoer is the person responsible for injuries of seizure, and the suit, which was against the admiral of the station, was dismissed on the ground that the admiral was not privy to the fact.

In the courts below (see Digest Federal Cases, title "War," secs. 34, 37) the cases involve privateers, the owners as well as officers of which are liable for damages. These cases for the most part refer to "unjustifiable conduct toward the property" or to personal ill-usage of the captured crew by the captors.

In *The Freya* (5 Rob., 75) there was a demand for damages on the part of a neutral vessel captured and brought to Dover, and there, in the performance of quarantine, assigned to an unfit berth before admission into the harbor. The court said that no blame attached to the captors, but since considerable injury had been received by the neutral vessel brought in by force, it seemed but proper that the matter should be presented to the Government as a damage fit to be redressed from that quarter, since it had happened under the management of the public officers of the port, though without any misconduct imputable to them.

In the *San Juan Baptista* and *La Purissima Conception* (5 Rob., 32) the master of the captor, a privateer,

ill treated the crew of the prize without sufficient justification, but also without malignant motive. Sir William Scott's judgment was that if such motive had been proved, it would have been his duty to pursue the matter much farther. As the case was, however, the conduct of the captor not being justified, he held that it was due to the honor of the country and to the injury the Spaniards had sustained that some civil compensation should be made, and decreed £100 to be distributed among the sufferers. Presumably this decree ran against the capturing privateer.

In *Die Fire Damer* (5 Rob., 357) the owners of a privateer were held liable for the improper conduct of the prize master.

In *The William* (6 Rob., 316) restitution in value was decreed against the captor for a ship and cargo lost in going into Guernsey, owing to the want of skill of the prize master who had refused to take a pilot on board.

In the foregoing cases it seems to be clear that most of them involve privateers, and that in all of them the payment of damages allowed was imposed upon the captors individually.

In *Der Mohr* (3 Rob., 129), a prize ship was lost owning to the ignorance and willfulness of the prize master, and the owner claimed restitution in value. The court thought it was undoubtedly a case of calamity, but that the gentlemen of the Navy were civilly answerable for the misconduct of the prize master, who was their agent, and restitution in value to the neutral owner was directed.

In a later case, respecting the freight of this ship (4 Rob., 315), it was held that the freight was not limited to the proceeds of the cargo saved, but was decreed *in toto* against the captors. If the loss had happened by accident only, the captor having made a justifiable seizure would not have been liable to any restitution.

> But the court has already pronounced this loss not to have arisen from any casual misfortune. * * * With respect to the attachment that is prayed against Captain Talbot, as long as the hope is held out that the assistance of government may be obtained in aid of the captor, it will be better to let this matter stand over. There must undoubtedly be a time when this forbearance must terminate, whatever the consequences may be. But at present I will content myself by pronouncing that the whole freight is due in value from the captor.

A note states that on a subsequent day the court was informed that directions had been given by government for the payment of the amount of this restitution.

In *The Acteon* (2 Dods., 48) it was decided that a captor, although actuated by a sense of public duty only in destroying property he has taken, is nevertheless responsible in the fullest extent to the claimant, and must look to his own government for indemnification. The general rule is said to be that if a party is unjustly deprived of his property he ought to be put as nearly as possible in the same state in which he was when the deprivation took place, and that if the captor

has been guilty of no willful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation. So, also, if the destruction of property taken may have been a meritorious act of the captor toward his own government, still the claimant must not be a sufferer. The captor "must look to the government for his indemnity. The loss must not be permitted to fall on the innocent sufferer. * * * If, as I believe to have been the case, [Captain Capel] has acted from a sense of duty and of obedience * * * I can have no doubt that he will be indemnified upon a proper representation being made to the government."

The Nemesis (Edw., 50) was the case of a prize brought into Falmouth Roads and there lost. The ship and cargo were clearly English property, and the *indicia* of that character and the evidence of innocence were considered by the court to be so clear that there was no excuse for sending her in.

> In those peculiar circumstances in which gentlemen of the Navy are often placed, having to decide and act in an instant on questions which are replete with difficulties that embarrass the court itself under all the advantages of a deliberate judicial investigation, it can not but feel great anxiety to protect them, perhaps sometimes even beyond what can be strictly reconciled with principle; but here was no difficulty at all, and if there had been any, the officer might have referred himself to his admiral, who was close to him. Acting under his orders, he would have been protected.

The court found the officer's conduct to be "equally wanting in respect to the admiral and in justice to those who were the victims of it; nothing has been suggested that affords any apology, and it is therefore with the most perfect satisfaction that I pronounce this to be a case of cost and damages"—which were evidently charged against the officer.

The Crimean war cases—*The Elize* (Spinks Prize Cases, 88), *The Ostsee* (id., 174), *The Leucade* (id., 217), *The Fortuna* (id., 307)—review the principles and authorities on the question whether, if the captor has been guilty of no willful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation. It is perfectly clear, however, from these and the earlier cases cited, that in England, where damages are allowed to claimants, the naval captors themselves are liable, and the propriety of indemnity by the Government is entirely committed to the executive or the legislature; and it is evident that the captors' liability arises upon a finding without probable cause, which is fully justified, although the officers may have been without willful fault.

See also, on the subject, sections 4648 and 4649, Revised Statutes. The former evidently contemplat the case of a condemnation, because the compensation for special counsel which is allowed is to be paid "either from the entire fund or from the portion awarded to the captors," although the services rendered may be on a matter as to which the captors

have an adverse interest to the United States. Section 4649 permits the fees of special counsel for the defense of captors against demands for damages, when audited and allowed by the Department incurring or authorizing them, and by the Solicitor of the Treasury, to be paid out of the judiciary fund. The inference from this certainly is not that the Government is liable, but the contrary. The Government simply helps captors make their defense.

In the comparatively few cases during the civil war in which the vessels were not condemned on appeal, the Supreme Court, for the most part, found that there was probable cause for the capture, and directed restitution without allowing costs and expenses to the claimants, or apportioned the costs and expenses between the claimants and the captors, and sometimes allowed the captors their expenses against the claimants.

In the case of *The Thompson* (3 Wall., 155), the concluding paragraph of the opinion is: "The district court committed no error in refusing to give the claimants damages and costs as against the United States or the captors."

In *The Teresita* (5 Wall., 180) it was directed, under a decree of restitution, that the costs and expenses should be paid by the captors.

(*d*) *The precedents show that relief for the naval captors has been obtained through Congress.*

An examination of the statutes discloses the following acts upon the subject:

Act of April 14, 1802 (6 Stat., 47), appropriates the

amount of damages and costs awarded by the circuit court of Pennsylvania in favor of a neutral against William Maley, commanding the *Experiment*, for the capture and detention of the schooner *Amphitheatre*. The act of January 31, 1805 (6 Stat., 56), appropriates for the relief of Captain Murray, of the *Constellation*, relative to the seizure of the *Charming Betsey*.

The act of January 17, 1807 (id., 63), directs the accounting officers to liquidate and adjust with George Little, commander of the *Boston*, the damages, interest, and charges in the case of the *Flying Fish*, wherein judgment was ultimately rendered in the circuit court in pursuance of the decision of the Supreme Court in *Little* v. *Barreme* (*supra*).

By act of February 2, 1813 (id., 116), damages allowed Shattuck (see 3 Cr., 458) against Lieutenant Maley—for whom appearance was entered and defense conducted by the attorney of the United States for the district of Pennsylvania, in pursuance of instructions given to him by the Executive (in the Supreme Court the Attorney-General appeared)—were paid out of the Treasury.

Act of May 26, 1828 (id., 394), allows to a British shipowner, an assignee of underwriters, a sum in full satisfaction for the capture and destruction of the ship by the *Peacock* after the period fixed by the treaty of Ghent for the termination of hostilities.

Act of January 17, 1862 (12 Stat., 901), appropriates compensation to a British vessel owner in consequence of detention by the U. S. S. *Massachusetts* under the

impression that she had unlawfully evaded the blockade of the port of Mobile. Here there seem to have been no proceedings for adjudication.

Act of April 25, 1862 (id., 902), allows damages to a neutral by reason of a wrongful seizure and detention by the *Morning Light*, a vessel of the United States blockading squadron, in pursuance of the award of arbitrators, to whom the claim seems to have been referred by the Executive. So also the act of May 12, 1862 (id., 903), appropriated the amount of damages awarded to another neutral on the same ground of complaint, and by the same arbitrators. These doubtless were cases of diplomatic reclamation.

By act of February 14, 1863 (id., 916), compensation was awarded to a neutral for damages sustained by reason of being prevented by the blockading force at Charleston from leaving the said port with cargo, the said bark having innocently entered during a brief interval during which the blockading force was absent. This also was diplomatic.

Act of February 13, 1864 (13 Stat., 575), appropriated the amount awarded as indemnification by the United States district court for the southern district of New York for costs, damages, and expenses, by reason of the illegal seizure of a British schooner.

Act of March 22, 1864 (13 Stat., 577), indemnifies French owners, but there is no reference to previous proceedings or adjudication.

Act of July 25, 1866 (14 Stat., 601), appropriates compensation by reason of wrongful seizure and deten-

tion of the British ship *Magicien* by the *Onward*, according to an award of Messrs. Evarts and Archbold under an agreement between the Secretary of State and the British minister.

Act of July 27, 1868 (15 Stat., 243), protects officers and agents of the Government in suits against them for acts done during the rebellion by virtue of their office, who are to be defended by the Attorney-General; these proceedings refer to cases arising under the acts relative to captured and abandoned property and respecting commercial intercourse between the loyal and insurrectionary States.

Act of July 7, 1870 (16 Stat., 649), appropriates to the owners of the British steamer *Labuan*, and to part owners of the cargo, the sums due under a decree of the district court for the southern district of New York on account of illegal capture by a cruiser of the United States. So also an act of the same date (ib.) appropriates to claimants in the case of the British schooner *Flying Scud* and her cargo sums due on account of illegal capture awarded by the United States district court for the district of Louisiana.

Act of July 8, 1870 (id., 650), makes a similar appropriation in the case of the English schooner *Sibyl*, to carry into effect a decree of the district court for the southern district of New York.

An act of the same date (ib.) makes a similar appropriation in the cases of the British brig *Volant* and the British bark *Science*, heard in the district court for the district of Louisiana.

Act of July 8, 1870 (id., 61), directed the proper payments to be made to carry into effect the decree of the district court for the district of Louisiana in the case of the British brig *Dashing Wave* and her cargo illegally seized.

Coming down to the present time, the urgent deficiency act of February 14, 1902, made appropriation for the payment of a judgment rendered by the United States district court for the northern district of Florida against the collector of customs for the illegal seizure and detention of the *Monarch*, suspected of filibustering.

This review of the statutes and the decisions establishes the following propositions: We submit that where damages for illegal seizure have been allowed, the Government is not liable because of the general doctrine protecting governments from liabilities unless self-imposed, and because, irrespective of innocent intent and proper motive, naval captors have uniformly been held liable in such cases arising in prize; that the liability is that of the individual commander of the capturing vessel, and that where the seizure is without probable cause it is he and not the admiral of the fleet or the squadron commander who is to be charged; that in this country the principle is fully recognized, and the precedents show that where the officer has not been in fault and it is a proper case for indemnification, he is indemnified by acts of Congress, which fact in itself establishes his liability before the courts.

Recurring finally for a moment to the measure of damages, the commissioner intimates that even his

liberal allowances do not fully compensate the claimants; that their expenses, not included in the award, comprise counsel fees and various costs of their litigation. Of course such elements are not embraced; counsel fees and other *ex parte* legal expenses are not usually or properly covered into the computation and allowance of damages. These intimations show the commissioner's strong leaning. Furthermore, it is very apparent that no consideration of the condition and age of these boats, the local knowledge at Key West regarding them as having been built or owned there, and regarding their values, has been allowed to affect the matter in the commissioner's mind, nor has he seemingly given a thought to the significant fact that in the commercial relations and ready interchanges existing between Key West and Havana these vessels were all sold back to parties in Havana and most probably to the claimants, and that for this reason the prices on resale should have been given great weight against the claimants. Every element and presumption and show of proof has been taken in favor of the claimants and against the Government. The food cargoes were allowed for at their swollen blockade values. Interest at 8 per cent, a proper enough basis, say in the year 1850, was granted. I respectfully submit that this is out of all reason, and that some qualification of this ready and easy method of grant to claimants against the Government should be imposed, either by this court or by the court below under the order of this court.

Again, as to responsibility—this is doubtless a case which will present a strong claim and appeal for indemnity to the liberal discretion of Congress; and one also in which the Executive might, with entire propriety, represent the facts and make a favorable recommendation in behalf of the officers of the Navy subjected to this liability.

I submit, therefore, that the decrees herein should be reversed; that the damages allowed should be readjusted, and that the proper amount thereof, as hereafter determined by this court or the court below, should be charged against the respective naval captors commanding the various capturing vessels, and not against the United States.

HENRY M. HOYT,
Solicitor-General.

O